Supreme Court, U.S.
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No. 09-

In the

SUPREME COURT OF THE UNITED STATES

Michael E. and Barbara Diane Hennessy
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Michael E. Hennessy, *pro-se*
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QUESTIONS PRESENTED

1. May administrative subpoena be issued by a Federal Administrative Agency when the system of records documented in accordance to administrative law substantiate that the targeted individual has not been administratively determined to stand within the subject matter of said Agency's administrative authority?

2. May an administrative agency who knowingly acknowledges the invalidly of information documented within its system of records maintained upon an individual withhold that knowledge from a Court of the United States in order to perfect its issuance of an administrative subpoena?

3. When an administrative agency's system of records documents all its information contained upon the individual upon an invalid segment of said system of records, does that administrative fact stand as an administrative determination that the agency's subject matter as it relates to any singular individual is legally invalid?

PARTIES TO THE PROCEEDING

The caption contains the names of all the Parties in the case.

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PETITION FOR WRIT OF CERTIORARI

The above-named petitioner(s) hereby petitions the United States Supreme Court for a Writ of Certiorari to review a decision of the 6th Court of Appeals, upon the grounds that Agency presumptions of subject matter move to subvert constitutional protections of individual privacy and is presented herein in compliance to Title 28 USCA Part IV Chapter 81 § 1254.

REFERENCES TO OPINIONS

The Report and Recommendation of the United States District Court was entered on July 6, 2007. Appendix 1a

The order denying petition of the United States District Court was entered on July 6, 2007 Appendix 9a

The Sixth Circuit affirmed the District courts decision on September 16, 2008 (Case #08-1181). Appendix 19a

The Sixth Circuit petition for rehearing en banc decision on February 19, 2009 Appendix 25a

JURISDICTION

On July 6, 2007, the United States District Court Eastern District of Michigan Southern Division. entered a Decision against Petitioner of which Petitioner appealed to the Sixth Circuit Court of Appeals. affirmed the Decision of the District Court. On Feburary 19, 2009 Petition for Rehearing/ Rehearing En Banc stating that the issue was fully reviewed.
Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

At issue is the statutory provisions by the Internal Revenue Service codified in Title 26USCA Subtitle F Chapter 78 § 7602. Agency' and the System of Records maintained in compliance to Title 5 USCA Chapter 5 § 552a upon an Individual.
Constitutional issue as found in the United States Constitution Amendment IV: The right of the people, to be secure in there person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularlydescribing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

An administrative agency shall maintain its records in compliance to Records Management by Federal Agencies, and the Administrative Procedures Act. In compliance to the Administrative Procedures Act, an Administrative Agency's records shall stand accurate, relevant, timely, and complete.

REASONS FOR GRANTING THE PETITION

In this instant case, the Internal Revenue Service's system of records contains a valid and invalid segment. This known segmentation of the Internal Revenue Service's system of records was information deliberately withheld from the United States District Court, and the 6th Court of Appeals. The known invalidly of an administrative record maintained upon an Individual is an operational determination by an agency, in this instant case the Internal Revenue Service that its administrative personnel have determined that its historical compilation of information is invalid as it pertains to the agency's subject matter jurisdictional relationship to said individual. The Internal Revenue Service deliberately withholds substantive evidence as to its system of records maintained upon an Individual, wherein said substantive evidence acknowledges the agency's determination of its relationship is invalid as it relates to the Individual, said statutory facts withheld are a deliberate act to violate the private rights of the targeted individual.

CONCLUSION

THEREFORE, Petitioner Michael E. Hennessy, respectfully request this Supreme Court Grant Petitioner's Petition for Writ Certiorari to review and uphold the wishes of Congress to provide the public with protection from any agency, including the Internal Revenue Service, involving issues raised in District Court, or any Court, civil or criminal, that are relevant to the statues and constitution, when the invalidity of record of the agency creates a lack of subject matter as it relates to this singular individual.

Respectfully submitted,

/s/ Michael E. Hennessy, Pro Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.06-x-50656
District Judge George Caram Steeh
Magistrate Judge R. Steven Whalen

MICHAEL E. HENNESSY and
BARBARA DIANE HENNESSY,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
et al.,
Respondents.
/

REPORT AND RECOMMENDATION

Before the Court is Respondent United State of America's *Partial Motion to Dismiss*, filed on February 13, 2007 [Docket #10] referred for a Report and Recommendation pursuant to 28 U.S.C. §636(b)(1)(B) on July 3,2007. For the reasons set forth below, the Court recommends that Respondent's motion to dismiss be GRANTED as to the out-of district summonses issued to MBNA, Washington Mutual Bank, and US Bank. Further, I recommend that Respondent's motion be DENIED as to the Oxford Bank summons pertaining to *non*-Plus One Enterprises accounts.

I. BACKGROUND FACTS

On June 21-22, 2006, Respondent Kelly Favier, Special Agent with the Criminal Investigations Division of the Internal Revenue Service issued five third party administrative summonses in connection with an investigation of Petitioners' taxable income for tax years 2000, 2001, 2002, 2003, and 2004. *Docket* #11, Exhibit 2 at '2. The five summonses, directed to a total of four banks, requested testimony by the banks' custodian of records, along with "papers, records, or other data." *Id.*, Exhibit 2, at '3.

On July 10, 2006, Petitioners' Michael E. and Barbara Diane Hennessy filed the instant petition to quash third-party summonses issued to the banks in question, Oxford Bank, supplemented by a "memorandum" the following day, also asking the Court to quash summonses to MBNA, Washington Mutual Bank, and US Bank by the Internal Revenue Service in the matter of Petitioners' tax liability for the periods 2000 through and including 2004 [Docket-#2].

II. STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(1) provides for dismissal of a complaint for lack of subject matter jurisdiction. When the defendant challenges subject matter jurisdiction, the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Moir v. Greater 0 Cleveland Regional Transit Authority*, 895 F.2d 266, 26996th Cir. 1990). In determining the "factual" existence of subject matter jurisdiction, "no presumptive truthfulness applies to the factual allegations, *see Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir~ 1990), and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *U.S. v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); Fed. R. Civ. P. 12(b)(1).

III. ANALYSIS

Respondent United States of America's contends that the Court lacks subject matter jurisdiction over "out-of-district" banks MBNA, Washington Mutual Bank, and US Bank. *Docket #10* at 2-4. Respondent argues further that Petitioners' failure to move to quash of one of the two in-district summons, pertaining to accounts other than Oxford Bank's Plus One Enterprises account, deprives this Court of subject matter over one of the two summonses issued to Oxford Bank.. Docket # 10, Exhibit 1.

A. Out-of-District Banks

26 U.S.C.A. § 7609(h)(1) states in pertinent part that "the United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g)."

I agree with Respondent's contention that Petitioners have failed carry their burden in establishing this Court's subject matter jurisdiction over MBNA, Washington Mutual Bank and US Bank. First, Petitioners have not only failed to respond to the present motion, but for all practical purposes concede the issue by asking this Court "to allow them to serve process on the out-of-district third party record keepers in the federal district where they reside or are found." Docket #12 at 2.

Next, and more fundamentally subject matter jurisdiction properly rests in the third party's principal residence or place of business. "The provision conferring jurisdiction on the district in which the summoned person is found .... is not intended to permit a summons directed to a third-person recordkeeper at that recordkeeper's residence to be challenged wherever else in the world the recordkeeper may be found." *Masat v. U.S. 745* F.2d 985, 987(5th Cir. 1984).

> "The taxpayer's motion to quash is directed towards an existing summons issued by the IRS to the third-party recordkeeper.... it is only logical that jurisdiction be vested in the district where the summons is to be answered. Allowing jurisdiction to be determined by the location of the taxpayer . . . would force the mountain to come to Mohammed ..."

Id. at 987-988~*See Oldham v U.S.*, 2002WL 507544, *2 - 3 (D.Or.,2002)(The fact that a company has large retail establishments in a jurisdiction does not establish subject matter jurisdiction for the purposes of quashing a third-party summons.) *See also Beck v. U.S.*, 60 Fed.Appx. 551, 552 (6th Cir. 2003). The petition to quash the three summonses directed to " MBNA, Washington Mutual Bank, and US Bank should therefore be dismissed for lack of subject matter jurisdiction.

B. Oxford Bank's non-Plus One Enterprises Accounts

26 U.S.CA. § 7609(b)(2)(A) instructs that "the right to begin a proceeding to quash [a] summons" must occur "not later than the 20th day after the day such notice is given." "This framework has been construed as a waiver of the government's sovereign immunity by granting parties a limited right to sue the United States. Such waivers of sovereign immunity must be strictly construed by the courts." *Glaspie v. US.*, 1993 WL 379596, *1 (E.D,Mich.1993)(Gadola, J.)(internal citations omitted). Respondent's argument that the petition to quash the *non*-Plus One Enterprises accounts was not timely filed is actually premised on the fact that the petition, alluding to a June 21, 2006 summons "issued to Oxford Bank's Custodian of Records" did not explicitly "reference[] or included []" the summons directed to the *non*-Plus accounts~ Docket #10 at 2. In addition, although Docket #1 and 2 include copies of the other four summonses to be quashed, Docket # 1, rather than

a copy of each of the two Oxford Bank summonses instead includes two copies of the summons directed toward the Oxford Bank Plus One Enterprises accounts.

Certainly, the pro se pleadings are somewhat muddled by the fact that Petitioners' initial pleading includes two copies of the summons directed toward the Plus One accounts and none of the *non*-Plus accounts.. However, I find that Petitioners' initial pleading, timely filed on July 10, 2006, is sufficient to put Respondent on notice that it seeks to quash both Plus One and *non*-Plus One accounts at Oxford Bank. For example, the first page of Docket #1states that the petition to quash includes books and records "issued by Agent Kelly Favier on June 21, 2006 to the Custodian of Records of Oxford Bank." By including both the date of the summons and the bank (but not the accounts) to which it was directed, Petitioners provided adequate notice to Respondent that they sought to quash both of the summonses issued to Oxford Bank on June 21, 2006. While under certain circumstances (e.g., several, rather than just two summonses issued to the same bank, or multiple summonses issued over a period of months), a failure to include a copy of the summons or describe the summons with more particularity would be fatal, in this case-specific determination, Petitioners' claim pertaining to the non-Plus accounts should be preserved.[2]

IV. CONCLUSION

I recommend that Respondent's partial motion to dismiss be GRANTED as to the out of district banks, and DENIED as to the non-Plus accounts at Oxford Bank.

Any objections to this Report and Recommendation must be filed within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. §636(b)(1) and E.D. Mich. LR 72.1 (d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Howard

v. *Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS* 931 F.2d 390,401 (6th Cir. 1991); *Smith v. Detroit Fed'n o/Teachers Local* 231, 829F.2d 1370,1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1 (d)(2), a copy of any objections is to be served upon this Magistrate Judge. Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue contained

S/R. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE
Dated: July 6, 2007

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served on the attorneys and/or parties of record by electronic means or U.S. Mail on July 6,2007

[1]Petitioners later motioned to amend the petition, adding the United States of America as a respondent [Docket #6] which was granted by this Court on January 26, 2007 [Docket #7].
[2] This finding is perhaps a hollow victory for Petitioners, since by separate Opinion and Order I have found their Petition to be without substantive merit

S/G. Wilson
Judicial Assistant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.06-x-50656
District Judge George Caram Steeh
Magistrate Judge R. Steven Whalen

MICHAEL E. HENNESSY and
BARBARA DIANE HENNESSY,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
et al.,
Respondents.
/

ORDER DENYING PETITION TO QUASH [Docket#l] AND GRANTING RESPONDENT UNITED STATES OF AMERICA'S SUMMARY DENIAL OF PETITIONS TO QUASH IRS SUMMONSES AND FOR ENFORCEMENT OF IRS SUMMONSES [Docket #11]

Before the Court is Petitioners' July 10., 2006 *Petition to Quash Administrative Summons!* [Docket #1] referred for Hearing and Determination on July 12, 2006. On February 13., 2007., Respondent United States of America filed *Motion for Summary Denial of Petitions To Quash IRS Summonses and For Enforcement of IRS Summonses* [Docket #11], which was referred for hearing and determination on July 2, 2007. For the reasons set forth below, Petitioners' motion to quash IS DENIED and Respondent's Motion is GRANTED.

I. BACKGROUND FACTS

On June 22, 2006, Respondent Kelly Favier, Special Agent with the Criminal Investigations Division of the Internal Revenue Service, issued five third party administrative summonses in connection with an investigation of Petitioners' taxable income for tax years 2000, 2001, 2002, 2003, and 2004. *Docket #11*, Exhibit 2 at 2. The five summonses, directed to total of four banks, requested testimony by the banks' custodian of records, along with "papers, records, or other data." *Id.*, Exhibit 2, at 3.

On July 10, 2006, Petitioners Michael E. and Barbara Diane Hennessy filed the instant petition to quash third-party summonses issued to the banks in question, Oxford Bank, supplemented by a "memorandum" the following day, asking the Court to also quash summonses to MBNA, Washington Mutual Bank, and US Bank by the Internal Revenue Service in the matter of Petitioners ' tax liability for the periods 2000 through and including 2004[2]

II. RELEVANT LAW

26 U.S.C. § 7602 states pertinent part:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry~

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the

person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." § 7602 identifies four separate investigatory purposes which would support the issuance of an administrative summons: (1) to determine the correctness of any return, (2) making a return where none was made, (3) determining a person's liability "for any internal revenue tax," and (4) collecting such liability. In addition, the information sought must be "relevant or material" to one of these investigatory purposes. *Calamari v. U.S.*, 2003 WL 345852 *1-2(E.D.Mich., 2003);26U.S.C. § 7602. *See also Scotty's Contracting and Stone, Inc. v.* U.S., 326 F.3d 785, 787 (6th Cir. 2003). A 1982 congressional amendment also provides that "the IRS may issue summonses for 'the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws. '" *Scotty's, supra*, 326 F3d at 788; 26 U.S.C. § 7602(b). Under "the plain language of the statute, the IRS's authority to issue summonses for the purpose of investigating any [criminal] offense relating to the tax code is extinguished only when the investigation is referred to the Department of Justice." *Id.*; 26 U.S.C. § 7602(d)(1).

Taxpayers may challenge administrative summonses by the IRS served upon third party record keepers. *Rae v. U.S.*, 2005 WL2715454, *2 (E.D.Mich.2005) (Binder.M.J.);26U.S.C.§§7609(b) (2); 7609(a)(3). However, pursuant to *U.S. v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112 (1964), the court will uphold a prima facie case for

enforcement of a § 7602 summons, established by a showing that "(1) the investigation has a legitimate purpose; (2) the summoned materials are relevant to that investigation; (3) the information sought is not already within the IRS's possession; and (4) the IRS has followed the procedural steps outlined in 26 U.S.C. § 7603."/*Calamari, supra* at 2. Typically, the government makes its prima facie showing through submission of an affidavit of the Investigating agent who issued the summons. *U.S. v. Will*, 671 F.2d963, 966 (6th Cir. 1982).

See also Cook v. U.S., 104 F3d 886, 889 (6th Cir. 1997). Once the government makes that showing, the burden shifts to the taxpayer to show that enforcement of the summons would be an abuse of the court's process. *United States v. Will, supra,* 671 F.2dat 966. The taxpayer can then rebut the government's prima facie case by refuting one of the *Powell* factors, *Mazurek v. United States*, 271 F.3d 226,230-31 (5th Cir. 2001), or by showing that "the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58,S.Ct. at 255.

III. ANALYSIS

Petitioners argue that the summonses should be quashed on the basis that the IRS issued the administrative summonses "solely in the pursuit of a criminal investigation." *Docket* #1, 2-3, *Docket* #2,4-5. Citing *United States v. LaSalle National Bank*, 554 F.2d 302, 309 (7th Cir. 1977), they argue that Respondent Kelly Favier's May, 2006 acknowledgment that the ongoing investigation was exclusively criminal in nature establishes the presence of bad faith in the issuance of June 2006 summonses.[3] *Docket* #1 at 2.

A. The Government Has Made a Prima Facie Case For Enforcement

Agent Kelly Favier's February 9, 2007 declaration contains the elements of a prima facie case for enforcement of a § 7602. First, the declaration states that the summonses are "for the purpose of determining whether Petitioners committed any offense connected with administration or enforcement of the internal revenue law." *Docket #11,* Exhibit 2 at 2. Next, Respondent has stated that the bank summonses, including bank statements, money order records, and securities are not only relevant, but necessary in determining whether Petitioners have complied with tax laws. *Id.* at'14. Further, Favier's declaration states that although she had obtained a number of bank records as a result a prior summons, "to the best of [her] knowledge and belief, the information sought in the current summonses "was not already within the possession of the Internal Revenue Service." *Id.* at '10-11, 13.

Finally, Respondent Favier's declaration also establishes that she has adhered to the procedural steps needed to establish a prima facie case under 26 V.S.C. § 7603[4]. *Docket*#11, Exhibit 2 at "5-6. Favier's attestation that she properly served both third party custodians and Petitioners is accompanied by documentation confirming that the summonses were delivered by certified or registered mail. *Docket #11,* Exhibit 1.

B. Petitioners Have Failed To Demonstrate Bad Faith

The Petition to Quash is premised solely on the mistaken belief that Respondent Favier's statement that she is pursuing an exclusively criminal investigation is irrefutable evidence of bad faith. Petitioners cite US. v. LaSalle Nat. Bank, 554 F.2d 302,309 (7th Cir. 1977), which holds that "the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith."

However, Petitioners overlook that the Supreme Court, reversing LaSalle the following year, narrowed the Seventh Circuit's holding by noting that "[t]he primary limitation on the use -of a § 7602 summons is that the summons may not issue *after the IRS recommends criminal prosecution to the Department of Justice." United States v. LaSalle National Bank*, 437 U.S. 298, 311, 98 S.Ct. 2357, 2365, 57 L.Ed.2d 221 (1978)(emphasis added).

More -obviously, this Circuit, -observing that in 1982 a congressional amendment to the Income Tax Code provided that "the IRS may issue summonses for 'the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws,'" has held that under "the plain language of the statute, the IRS's authority to issue summonses for the purpose -of investigating any -offense relating to the tax code is extinguished only when the investigation is referred to the Department of Justice." *Scotty's Contracting and Stone, supra*, 326 F.3dat 788; 26 U.S.C. § 7602(d)(1).

In the present case, Respondent attests that her investigation has not been referred "for either a grand jury investigation or criminal prosecution to the Department()f Justice." *Docket #11*, Exhibit 2 at'14. Although Petitioners contend that Respondent's pursuit of an exclusively criminal investigation establishes the presence of bad faith, her declaration and accompanying documentation indicate conclusively that her issuance of the present summonses is within the parameters setout in 26 U.S.C. § 7602. Aside from Petitioners' present argument, they have failed to demonstrate or even allege any other examples of bad faith by Respondents which would justify quashing the administrative summonses. The Petition to Quash [Docket # 1] is therefore DENIED. Respondent's Summary Denial of Petitions to Quash IRS Summonses and for Enforcement of IRS Summonses [Docket #11] is GRANTED[5]. SO ORDERED.

Dated: July 6, 2007

SIR. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE
The undersigned certifies that a copy of the foregoing order was served on the attorneys and/or parties of record by electronic means or U.S. Mail on July 6, 2007.

[1]petitioners later motioned to amend the petition, adding the United States of America as a respondent [Docket #6] which was granted by this Court on January 26, 2007 [Docket #7]

[2]Respondent United States of America also filed a motion for partial dismissal arguing that the Court lacks subject matter jurisdiction over "out-of-district" banks MBNA, Washington Mutual Bank, and US Bank, arguing further that Petitioners failed to timely petition to quash one of the two summonses made on Oxford Bank (non-Plus One Enterprises account) [Docket#10]. Accordingly~ Respondent argues that only one of the two local summonses Oxford Bank (Plus One Enterprises accounts) and none of the "out-of district" summonses are at issue here. By separate Report & Recommendation, I have recommended that the jurisdictional motion to dismiss be granted as to the out-of-district banks, but denied as to the other account at the Oxford Bank. However, Respondent also contends that to the extent that this Court rejects jurisdictional arguments for dismissal of the other four summonses requested in Docket #10, it has established in the present motion a prima facie case for enforcement of all five summonses in dispute. This Opinion discusses all five summonses in the event that the District Judge rejects any portion of the separate Report & Recommendation.

[3]Petitioners allege that the fact that Respondents are pursuing a solely criminal investigation was also confirmed by "an [a]ttomey in the employ of the General Counsel Office." *Docket* #1 at 2, *Docket* #2 at4.

[4]26 U.S.C. § 7603 states in pertinent part:
"A summons issued under section ...7602 shall be served by the Secretary, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty."

[5]Respondents' Motion to Dismiss [Docket #10] argues that this Court enjoys subject matter jurisdiction over only one of the five summonses (Oxford Bank, Plus One Enterprises account). However, to the extent that jurisdiction is present, the above order is applicable to all five summonses.

S/Gina Wilson
Judicial Assistant

No. 08-1181

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,

MICHAEL HENNESSY; BARBARA DIANE HENNESSY, Plaintiffs-Appellants
v.
COMMISSIONER, INTERNAL REVENUE SERVICE; KELLY FAVIER;UNITED STATES OF AMERICA, Defendants- Appellees.

FILED Sep 16,2008 LEONARD GREEN, Clerk

ORDER

Before: MOORE and COLE, Circuit Judges; GRAHAM, District Judge."

Michael and Barbara Hennessy, Michigan residents proceeding pro se, appeal the district court's order denying their motion to quash five third-party Internal Revenue Service (IRS) summonses. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2006, an IRS agent issued summonses, pursuant to 26 U.S.C. §§ 7602, 7603. requesting the Hennessys' financial records from the following banking institutions: MBNA in Newark, Delaware; US Bank in Minneapolis, Minnesota; Washington Mutual Bank in Chatsworth, California; and Oxford Bank in Oxford, Michigan. The Hennessys timely filed a petition to quash the summonses in the federal district court for the Eastern District of Michigan pursuant to 26 U.S.C. 7609(b)(2)(A), asserting that the summonses were issued in bad faith and were prohibited because they were issued solely in pursuit of a criminal investigation. In response, the appellees filed a motion for summary judgment on the basis that the IRS had the authority to issue the summonses and that they should be enforced. The appellees also filed a motion for partial dismissal on the basis that the district court could not entertain the portion of the petition relating to the three summonses issued to banks outside of the district court's jurisdiction in Michigan.

The matter was referred to a magistrate judge, who recommended that the partial motion to dismiss be granted as to the three out of district summonses to MBNA, Washington Mutual Bank, and US Bank. The magistrate judge also recommended that the petition to quash should be denied. Upon de novo review of the parties objections, the district court adopted these recommendations, dismissed the three out-of-district summonses for lack of jurisdiction and denied the petition.

On appeal, the Hennessys argue that the appellees issued the summonses in bad faith because: 1) they were deliberately delaying the referral of their criminal investigation to the Department of Justice in an attempt to pressure the Hennessys to settle a collateral dispute in tax court, and 2) the government has not established that a tax liability may be due and owing.

The parties do not challenge the district court's decision to dismiss the petition for lack of jurisdiction with respect to the three out-of-district summonses to MBNA, US Bank, and Washington Mutual. Moreover, the appellees have abandoned their argument that the district court did not have jurisdiction to consider the petition with respect to one of the Oxford Bank accounts. Therefore, these issues need not be considered by this court on appeal. *See Dillery v. City of Sandusky, 398 F.3d 562, 569 (6th Cir. 2005); United States v. Demjanjuk, 367 F.3d 623, 638 (6th Cir. 2004).*

We review for clear error a district court's denial of a petition to quash an IRS summons. *See Fortney v. United States, 59 F.3d 117, 1 19 (9th Cir. 1995).* Under the clearly erroneous standard of review, "we must affirm the trial court unless we are left with the definite and firm conviction that a mistake has been committed." *Alexander v. Local 496, Laborers Int'l Union of N. Am., 177 F.3d 394,402 (6th Cir. 1999)* (citation omitted). We conclude that the district court did not clearly err in denying the Hennessys" petition.

Section $ 7602(a) directs that:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry. . . .

26 U.S.C. § 7602(a). -A decision, to grant a motion to quash is governed by the framework set forth in *United States v. Powell,* 379 U.S. 48 (1964). *See Kondik. United States*, 81 F.3d 655, 655-56 (6th Cir. 1996). "Under *Powell*, the government bears the initial burden of establishing a prima facie case of 'good faith' by showing that the summonses: 1) were issued for a legitimate purpose; 2) seek material relevant to that purpose; 3) seek material that is not already in the government's possession; and 4) satisfy all administrative steps required by the United States Code." *Id.* at 656 (citing *Powell*, 379 U.S. at 57-58). "The requisite showing is generally made by the submission of an affidavit from the agent who issued the summonses," *Id.* (citation omitted). "Once a prima facie case has been established, the burden shifts to the taxpayer to prove that enforcement of the summonses would be an abuse of the court's process. "*Id.* (citation omitted). That "burden is a heavy one." *Id.* (citing *United States v. LaSalle Nat'l Bank*, 437 US. 298, 316 (1978)).

The appellees established, by the Declaration of Agent Kelly Favier, a prima facie case for enforcing the summonses, demonstrating that a legitimate investigation was being conducted, that the inquiry was for a relevant purpose, and that the evidence being sought was not already in the IRS's possession. Contrary to the Hennessys' argument, the plain language of § 7602 makes clear that the IRS has the authority to issue summonses for the purpose of investigating any offense relating to the tax code, so long as the investigation has not been referred to the Department of Justice. *See Scotty's Contracting and Stone, Inc v. United States*, 326 F.3d 785,791 (6th Cir. 2003). The statute does not contain an exception for investigating purely criminal offenses, *Id.* The Hennessys failed to show that the government issued the summonses in bad faith or that the enforcement of the summonses would be an abuse of the court's process. The Hennessys' bare allegations do not meet their heavy burden

of showing that the government issued the summonses for an improper purpose, such as to harass the Hennessys, to put pressure on them to settle a collateral dispute, or for any other purpose reflecting on the good faith of the government's investigation. *See Powell*, 379 U.S. at 58.

The Hennessys also raise issues relating to the merits of their underlying tax case. These issues will not be considered because they were not raised in their petition to quash the summonses, and were never presented to the district court. *See Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 477 (6th Cir. 2004); *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 2 19 F.3d 5 19,545 (6th Cir. 2000).

For the above reasons, the district court's order is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Leonard Green Clerk

Filed: February 19,2009

Michael Hennessy, Barbara Diane Hennessy

Re: Case No. 08-1181,*Michael Hennessy, et* a1 v. *Commissioner, Internal Revenue*, Originating Case No. :06-50656

Dear Sir and Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
Transcript En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Robert J Branman

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HENNESSY, ET AL.,
Plaintiff-Appellant
v.
COMMISSIONER, INTERNAL REVENUE SERVICE,ET.,
Defendants-Appellees.

BEFORE: MOORE and COLE, Circuit Judges;
and GRAHAM, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ORDER OF THE COURT Leonard Green Clerk

MICHAEL HENNESSY, ET AL.,
Plaintiff-Appellant
v.
COMMISSIONER, INTERNAL REVENUE SERVICE,ET.,
Defendants-Appellees.

BEFORE: MOORE and COLE, Circuit Judges;
and GRAHAM, District Judge.

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ORDER OF THE COURT
Leonard Green Clerk

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